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No. 74-712

In the Supreme Court of the United States

October Term, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT GERALD PAGE

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QUESTIONS PRESENTED

1. Whether a subcontractor under a single contract with a prime contractor can be charged with a forfeiture under the False Claims Act for each of many invoices submitted to the United States by the prime contractor when the subcontractor played no part in determining when and how many invoices were to be submitted.

2. Respondent Page accepts petitioner's presentation of question 2.

3. If this Court finds error in the decision below with respect to question 2 there is necessarily included the question of whether respondents should be precluded from contending that damages should be reassessed to

(a) allow only those properly proven, and (b) credit respondents with the fair market value of goods delivered to the United States, when the trial court awarded only nominal damages and therefore held that respondents' contention as to credit was moot, and respondents took no appeal from the damages aspect of the judgment

STATUTE INVOLVED

Petitioner's brief purports to set forth the pertinent provisions of the False Claims Act, 12 Stat. 696, 698 as embodied in 31 USC §231. (Brief, p. 2) 31 USC §231 has never been enacted into positive law[1] and therefore

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[1] See Preface, The Code of Laws of the United States, p. 15 stating that the Code is "prima facie the law. It is presumed to be the law. The presumption is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code". Table II to U.S.C.A. shows that R.S. §3490 is unrepealed. §5438 has been repealed. Rainwater v. United States, 356 U.S. 590, 591 n. 1, 592 n. 8; United States v. Neifert-White Co., 390 U.S. 228, 229 n. 1; United States v. McNinch, 356 U.S. 595, 598 n. 5; United States ex rel. Marcus v. Hess, 317 U.S. 537, 539-540. See also the legislative history in the opinion below (Pet. App. A, p9A-10A)

the official language of the Act is as set forth in RS §§3490 and 5438,[2] insofar as here pertinent, as follows:

R.S. §3490:

> "Any person. . . who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES', shall forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act..."

R.S. §5438:

> "Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil,

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2 United States v. Neifert-White Co., supra.

> military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim. . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars".[3]

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3 As quoted in United States v. Neifert-

[3] Footnote continued from preceding page
White Co., 390 U.S. 228, 229 n.1, with the addition of the numbers in brackets.

STATEMENT

Respondent Page accepts the petitioner's statement of the case, with the following exceptions:

1. Petitioner does not accurately describe the record with respect to actual damages incurred.

a. Petitioner's brief misstates the status of the proof with respect to damages.

Petitioner says (p.4):

> "The Army, upon discovering that the tubes had been falsely branded, expended $16,205.44 to replace them with tubes that conformed with the contract specifications".

The record does not support this statement. The United States did claim damages of $40.82 per tube as its re-

placement costs. However, the question was left to further proof in Stipulation 17 (o), as follows (App. p. 47):

> "The cost to the United States in replacing the 442 falsely marked 4 x 150G electron tubes was $40.82 per tube or a total of $18,042.44 which is subject to proof by voucher or affidavit". (Emphasis added)

The reason for the requirement of further proof by "voucher or affidavit" is found in the Government's answer to Supplemental Interrogatory #2, the question and answer to which read as follows (Stipulation 25, App. p. 50, 59-60):

> "2. As to each tube taken from Model shipments as alleged in the answer to original interrogatory #23, state whether or not such

> tube was replaced, and if so the date of replacement, the source of the replacement, giving the name and address of the supplier thereof, and the consideration, if any, paid therefore and the name and address of the person to whom such consideration was paid".
>
> "2. Answer: None of the tubes taken from Model shipments as set forth in answer to original Interrogatory No. 23 were replaced".

This answer is reaffirmed (1) in the letter of April 19, 1971 (App. p. 52) from the United States Attorney to Jack Ballan, (Respondent Bornstein's attorney) which states that "as a matter of fact, the tubes were not replaced...", and (2) the answer of interrogatory #23 which said that the tubes were "presently in storage". (App. p. 56)

Subsequently, the Government submitted certain papers which it claimed were in compliance with Stipulation 17 (o). These were:

i. A letter dated June 18, 1964 (App. p. 91) and a "Coordination Sheet" dated July 2, 1964 (App. pp. 93-94), neither being a"voucher or affidavit". These together showed the following:

a. All tubes removed were to be identified, photographed, and recorded, and then "retained in issue stock" having previously been "frozen from issue". (App. p. 91).

b. 298 tubes "are being held in abeyance in the security area [and] [t]ubes have been obtained to replace the tubes taken from the accessory kits". (App. p. 93).

c. A "cost break-down for labor, material and inspection to remove tubes from 149 sets" gave a figure of $40.82 per tube, but gave no indication as to whether this was an actual cost of replacement (App. p. 94).

ii. An affidavit of one John Russell stated that 96 tubes were replaced at a cost of $40.82 per tube or $3,918.72; the 96 "counterfeit" tubes were "placed under the control of the Security Officer". (App. p. 109).

Respondents argued in the district court that the above did not constitute the required proof by voucher or affidavit, and objected to the timeliness of its submission. That court, however, accepted it as establishing replacement

costs. (Pet. App. C, p. 26 A, n.9). In any event the district court held the question of actual value moot because of its total treatment of the damage issue. (Pet. App. p. 32 A).

We submit that a review by this Court will confirm respondent's contention that certainly the Russell affidavit was untimely and inadequate. The Stipulation of Facts was filed April 13, 1973. (App. p. 38). Briefs on both sides were then filed and thereafter, on May 22, 1974 (App. p. 87) the documents referred to in paragraph i above were filed. Not until June 4, 1973 was the Russell affidavit filed. (App. p. 107).

In any event, even if the Russell affidavit be considered, it established

the replacement cost of only 96 of the 397 tubes involved, or only $3,918.72 out of the total alleged damages of $16,205.54. As to the balance of the tubes, petitioner never proved, or even claimed, any actual loss or damage.

b. Petitioner's brief does not take any account of the value of the tubes in fact delivered.

As the preceeding shows, at least 298 of the disputed tubes were "retained in issue stock" and another 96 were held in control of the Security Officer. The record demonstrates that these tubes were not defective in any physical way, although they were falsely branded.

The Government stated in answers to interrogatories that it did not claim

that the tubes were ". . . defective by reason of different physical, electronic, performance or similar characteristics from those required to be delivered to it under its contract with Model . . ." (Supplemental Interrogatory #1, App. p.57)

The Government's complaints were based entirely on a failure of defendants to follow the strict JAN regulations as detailed in paragraphs 12 to 16 of the Stipulation (App. pp. 41-45), Interrogatories #20 and 21 (App. pp. 54-56), and Supplemental Interrogatory #1, (App. pp. 57-58).

Secondly, a MIL/E1 electrical test was actually performed on the tubes in question and they were found operable. Stipulation 17(k)(App. p. 47).

Stipulation 17 (a) (App. p. 45) established a market price of $15.52 for the tubes actually delivered, which for the 397 tubes would total $6,161.44. The issue of whether respondents should have been credited with this amount was never reached because under its findings of only nominal damages, the district court held it to be moot. (Pet. App. C, p. 32A), For the same reason the court of appeals also did not reach this issue (Pet. App. A., p. 8A).

2. <u>The record negates any role by respondents in the determination by Model to submit its claims in 35 invoices and there is no proof that Model shipped the radio kits in 35 lots</u>.

Petitioner asserts that Model

shipped the radio sets in 35 lots (Brief p. 4). There is no proof that it shipped 35 lots or any other number of lots. The passage cited by petitioner from the district court's opinion (Pet. App. C., p. 26A) does not support petitioner's statement in this regard. It merely says:

> "Model submitted to the United States thirty-five claims for payment under the contract. These claims were designated as invoices"

Stipulation 24 on which this finding was based reads in full as follows: (App. p. 50)

> "24. Model submitted to the United States 35 claims for payment under the Contract which were designated as invoices. Each of the 35 invoices of Model included claims for payment for JAN 4 X 150 G tubes which had been 'JAN' branded by the defendants. The 35 invoices covered payment for the

> entire contract and the United States paid Model's 35 invoices with eight Government Vouchers (Exhibit G-23(a) through (h)). The defendants did not prepare any of the above-mentioned documents, or have knowledge of the manner in which the claims of Model were presented."(Emphasis added).

3. The $18,000 which petitioner says "Model paid the Army" (Brief, p. 5 n.5) was in fact withheld by the United States from payments due to Model under the prime contract.

Answer to Supplemental Interrogatory #4 states:

> "The plaintiff received the sum of $18,000 from Model Engineering in the form of a deduction from Model invoice, per voucher #121073, 13 December 1966, in accordance with Exhibits listed under Answer 3, and copy of voucher attached hereto marked Exhibit #6". (App. p. 60).

Thus payment was made and the deduction credited under this particular

voucher, #121073. This voucher (Exhibit #6 to the answers to Supplemental Interrogatories, App. p. 69) gives as the "contract number" under which payment is made "DA-36-039-AMC-01080/E" which is the very contract involved in the present action. (Stipulation 7, App. pp. 39, 84). On this same voucher under the heading "Number and date of order" there appears "15263-PP-63-Al-51 8-29-62" opposite the number "28,317.20", the amount against which the $18,000 credit is applied. The date "8-29-62" is the very date of the contract here involved and the number "15263-PP-63-Al-51" is the order number on the contract itself (ibid) and is the same order number which appears on all of

Model's other vouchers submitted for payment under the present contract. (App. p. 85).

SUMMARY OF ARGUMENT

The court below correctly held:

(1) The False Claims Act imposes a $2,000 forfeiture only for each act of the party charged with making a false claim or causing one to be made, not for the fortuitous acts of others in submitting multiple invoices; (2) When the United States has withheld payment from a prime contractor on account of fraudulently branded goods furnished by a subcontractor, the subcontractor is to be given credit for the amount of the payment thus withheld before damages are doubled; (3) Because this holding resulted in only nominal damages it did not reach the question of actual damages and proper credits for the goods received.

I.

As to the first holding, the text of the Act, as set forth in R.S.§§3490 and 5438 provides a $2,000 forfeiture to be paid by any person who shall do any of the prohibited acts, which, as here applied, are the making or causing to be made of a false claim. The Act does not prescribe forfeitures for acts committed by others than the person charged. This interpretation of the Act is consistent with the only previous case in this Court dealing with the issue. United States ex rel. Marcus v. Hess, 317 U.S. 537.

While petitioner may be correct in stating that the statutory violation is complete when a subcontractor causes

its prime contractor to present a false claim to the United States (Brief p. 7), it goes beyond the statute when it asserts that separate forfeitures may then be imposed each time the prime contractor submits an invoice, even though no further acts are committed by the sub-contractor.

In any given case, the impact of the forfeiture provision may or may not be sufficient to operate as a deterrent, but this is not the function of this provision and therefore furnishes no basis for expanding the reach of either the forfeiture or the double damages clauses. The function of deterrence is left to the criminal provisions of the Act, now appearing in 18 USC §§287 and 1001.

II.

Since the purpose of the Act is to indemnify the Government (United States ex rel. Marcus v. Hess, supra, 317 U.S. at 549) when it has withheld money attributable to the false claims, its damages only begin with the amount in excess of the amount withheld, and only this amount should be doubled. This is true even where instead of withholding, it has received payments attributable to the false claim from those in privity with the wrongdoers. United States v. Klein, 230 F. Supp. 426, 443 (W.D. Pa.) affirmed per curiam, 356 F. 2d 983 (C.A. 3).

III.

Should this Court nevertheless find

that damages should be doubled before credit is given for the amount charged to the prime contractor, this Court should not direct entry of judgment, but should remand the cause to the district court for a proper determination of the actual damages suffered and credits to be allowed.

The trial court had (1) determined the government's replacement costs for the falsely branded tubes to be $40.82 per tube as against respondents' contention that neither the replacement nor the replacement cost had been properly proven and, (2) failed to pass on respondents' claim to credit for the fair market value of the tubes delivered to and retained by the Government, correctly holding that because only nominal damages

were being awarded in any event, this claim was moot. Respondents did not appeal from the district court's decision on damages.

In fact, in view of the nominal damage award, all questions of actual damages and of allowable credits were moot and the court of appeals would have had no jurisdiction to consider an appeal by respondents from the district court's opinion on those questions. St. Pierre v. United States, 319 U.S. 41, 43, and cases there cited. But if this court should hold that damages are to be doubled before allowance for payments made by or withheld from the prime contractor, the question of the actual amount of those damages and of the credit to be allowed

for the market value of the tubes will no longer be moot. In that event, the cause should be remanded to the district court for determination of those questions under appropriate directions from this court.

ARGUMENT I

A SUBCONTRACTOR UNDER A SINGLE CONTRACT WITH A PRIME CONTRACTOR FOR THE UNITED STATES WHO PLAYED NO PART IN DETERMINING WHEN AND HOW MANY VOUCHERS WERE SUBMITTED BY THE PRIME CONTRACTOR IS NOT LIABLE FOR MORE THAN ONE FORFEITURE UNDER THE FALSE CLAIMS ACT.

A. The statutory text prescribes forfeiture only for acts of the party charged.

The False Claims Act is officially set out in R.S.§3490. It provides a forfeiture for the doing or committing of an "act" prohibited by the criminal provisions of R.S. §5438. The prohibited acts broadly stated are: (1) making or presenting or causing to be made or presented a false claim; (2) making, using or causing to be made or used, a false document, or (3) entering into an agreement, combination or conspiracy to de-

fraud the United States by obtaining the payment or allowance of a false claim.

The statute thus allows imposition of a $2,000 forfeiture upon the commission of an act by the party charged, not upon the doing of acts by someone else. But petitioner here seeks to levy a separate forfeiture for each of the 35 acts committed, not by respondents but by someone else, Model, in making claims for payment on 35 vouchers, even though it was stipulated that respondents did not prepare any of the vouchers and did not have knowledge of the manner in which the claims were presented. (App. p. 50).

Petitioner seeks this result on the argument that the text of the False Claims Act "prescribes a separate $2,000

forfeiture for each false claim ... presented to the United States." [4] (Brief, p. 12). The text, however, does not prescribe forfeitures for claims filed by others, but for acts done by the party charged. Even if it be conceded, for purposes of argument, that respondents' overall conduct "caused" the filing of 35 or any other number of false vouchers by Model, there is no showing that there was more than one act by respondents,

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[4] The court below said that §3490, "if literally applied . . . would permit a separate $2,000 forfeiture . . . for each invoice submitted by the main contractor". (Pet. App. A, p. 16A). We think this statement is not supported by the statutory language, although the conclusion reached by the court of appeals is in conformity with the statute.

the entry into the contract with Model under which falsely branded tubes were delivered,[5] which caused such filings.

Put differently, respondents' conduct or acts ended when they delivered the falsely branded tubes to Model and their role in causing Model to submit one or more false claims was over. Thereafter Model could have submitted

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[5] It might be argued that since respondents made 3 shipments of tubes under 3 invoices (Stipulation 18, App. p. 48), they committed not one, but 3 acts. However, the case was neither tried nor submitted on that theory, and the court of appeals therefore properly followed its earlier holding in United States v. Rohleder. 157 F.2d 126 (C.A. 3) (Pet. App. A. p. 17 A)

any number of vouchers from one to 199[6] or more, for the radio sets which contained falsely branded tubes received from respondents. Under the Government's theory, had Model submitted the maximum number of vouchers, respondents would have been charged with a $2,000 forfeiture for each. It is inconceivable that Congress intended such a result in what this Court has held to be a civil damage, not a penal statute. United States ex rel. Marcus v. Hess, supra 317 U.S.at549.

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[6] Each radio set contained 2 tubes (App. p. 39) and respondents are charged with 397 falsely branded tubes. (Petitioner's brief p. 4 n.4). The figure of 199 assumes all the falsely branded tubes were paired in sets.

The Hess case, the only case in this Court we have found dealing with this issue (see opinion below, Pet. App. A, p. 12A) is consistent with this position. It sustained a judgment of one forfeiture for each contract entered into by the party charged, as against a claim that forfeitures should also be charged for each false document submitted. 317 U.S. at 552. This Court referred to §3490 as requiring a $2,000 forfeiture "for doing 'any' of the acts prohibited by §5438", (ibid.) the reading of the statute which we urge here.

Other cases in this Court touching on this question, although not dealing with it directly, are consistent with this position. In Rainwater v. United

States, 356 U.S. 590, 592-593 the opinion noted that the "civil portion of the Act incorporates, as a test of liability, the provisions of the criminal section as they were set out in §5438 of the Revised Statutes of 1878, and that according to familiar principles the scope of these provisions should be confined to their literal terms . . . [while giving them] 'their fair meaning in accord with the evident intent of Congress'". Imposing forfeitures only for acts committed by respondents, while at the same time using the flexible approach of the Hess case in deciding which acts to use, conforms to this view.

Petitioner cites (Brief, pp. 8,16) United States v. Neifert-White Co.,

390 U.S. 228, 233 for the proposition that the "focus of the Act is upon the presentation of false claims, not upon the existence of contractual relations." The issue in that case was whether the Act reached "'claims' for favorable action by the Government upon applications for loans or is it confined to 'claims' for payments due and owing from the Government?" 390 U.S. at 230. The Court reversed a dismissal by the lower courts which held that it did reach "claims" for loans. The Court did not have before it any issue as to how many forfeitures were to be assessed for making such claims. There is nothing in the opinion which implies that forfeitures were to be assessed for acts other than those committed by the defendant.

While it may be true that the 35 invoices presented for payment by Model were "claims" within the meaning of the Act (Petitioner's Brief, p. 13 n. 8), the case cited by petitioner, United States v. McNinch, 356 U.S. 595, 598-600 does not support the theory that respondents are therefore liable for 35 forfeitures. The case affirmed lower court decisions holding that an application for credit insurance was not a "claim" within the meaning of the False Claims Act. 356 U.S. at 597. The Court said (id. at 598):

> "But it must be kept in mind, as we explained in Rainwater [supra], that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute.

> Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions".

The Court found it "clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government". 356 U.S. at 599. It is equally clear that not every false claim filed by someone other than the person charged is the basis for assessing a forfeiture.

In every civil False Claims Act suit there are two fundamental issues: (1) has there been a fraudulent assertion which is deemed to be a "claim" within the meaning of the Act? (2) If there has, for what act or acts is the

defendant to be charged with a $2,000 forfeiture? Petitioner's position here merges these two separate issues and asks this Court to hold that once a fraudulent "claim" is established, a defendant is chargeable with a $2,000 forfeiture without regard to how his own acts determined the number or timing of the claims. The confusion of these separate issues is contributed to by considering only 31 U.S.C. §231 as quoted on page 2 of petitioner's brief. If the official version of R.S.§3490 is read (as in the Rainwater, McNinch, Neifert-White and Hess cases, supra), the confusion disappears. For none would assert that a criminal defendant could be charged with a separate crime

for each fortuitous act of someone else in choosing to submit several separate claims to the Government rather than one.

Nor do the lower court cases cited by it support the Government's position. United States v. Rohleder, 157 F. 2d 126 (C.A. 3) (Petitioner's Brief, p. 13) was relied on by the court below (Pet. App. A. p. 14A) and directly supports its decision limiting the number of forfeitures to the number of contracts entered into by the defendant.

In United States v. National Wholesalers, 236 F. 2d 944, 950 (C.A. 9), cert. denied, 353 U.S. 930 (Petitioner's Brief, pp. 13, 17) the defendant was the prime contractor to the Government.

The Court found that each of 17 invoices submitted by it were false, but nevertheless limited the number of forfeitures to 8, the number of vouchers on which payments for false claims were prepared and made by the Government since there was no evidence that 17, rather than a lesser number of payments were contemplated by the defendant. The court said that "a loose count of false claims should not be made". The case does not support the Government's theory in the case at bar that respondents are chargeable with forfeitures for the 35 invoices submitted by Model. There was no evidence . . . that Model contemplated 35 payments when it submitted its invoices, so that no more than 8 forfeitures for the 8

vouchers actually paid (App. p. 50) could in any event be imposed, even on the Government's theory. In truth, though, the correct analogy is to the fact that there is no evidence that respondents here contemplated more than one payment when they entered into the contract with Model.

In United States v. Woodbury, 359 F. 2d 370, 377-378 (C.A. 9) (Petitioner's Brief, p. 13), a forfeiture for each of 10 false claims submitted by the defendant was sustained, as against the Government's contention that there should have been additional forfeitures based on various false papers attached to the claims. Nothing in the case charges the defendant with forfeitures for numbers of papers submitted by others.

In United States v. Grannis, 172 F. 2d 507 (C.A. 4), cert. denied, 337 U.S. 918 (Petitioner's Brief, p. 13) there were 130 separate shipments accompanied by vouchers with annexed schedules containing false statements as to ownership and valuation. The Government argued that a separate $2,000 forfeiture should be imposed for each of the 130 shipments in addition to 10 forfeitures for each of 10 false vouchers submitted for payment by the defendants themselves (172 F. 2d at 515, 516). The court expressly denied this contention and limited the number of forfeitures to the 10 false vouchers which were

actually submitted by the defendants themselves. It relied on the Hess and Rohleder cases, supra.

In Toepleman v. United States, 263 F. 2d 697 (C.A. 4), cert. denied, 359 U.S. 989 (Petitioner's Brief, p. 13) defendant was charged with forfeitures only for fraudulent notes he himself had submitted.

Faulk v. United States, 198 F. 2d 169, 171 (C.A. 5) (Petitioner's Brief, p. 13) involved only 5 forfeitures and no issue concerning the number was raised.

In United States v. Collyer Insulated Wire Co., 94 F. Supp. 493 (D.R.I.) (Petitioner's brief, p. 20) the defendants were charged with forfeitures for 105 separate false claims, each of

which were submitted by the defendants themselves who were the direct contractors with the government. They were not charged with false claims based upon an arbitrary break-down of invoices or vouchers made by someone else. Since the case deals only with a prime contractor, the passage quoted on p. 20 of Petitioner's Brief inserting the word "subcontractor" in brackets gives an erroneous impression.

The only case which in theory supports the Government position here is United States v. Ueber, 299 F. 2d 310 (C.A. 6). Interestingly, however, while, if technically viewed, that case did assess forfeitures against a subcontractor based upon the number of

vouchers presented by the prime contractor to the United States, the actual effect was to limit, rather than expand, the number of forfeitures assessed. The prime contractor held cost-plus-fixed-fee contracts with the United States. The subcontractor in turn held "time and material" contracts with the prime contractor and presented 422 false invoices each of which resulted in an increased claim presented to the Government because of the effect of the subsidiary time and material subcontract on the cost-plus-fixed-fee prime contract. Nevertheless, the forfeitures were limited to one for each of 54 vouchers presented to the United States

by the prime contractor. Certainly, the spirit of the Ueber case does not justify imposing 35 forfeitures on respondents for their single contract and 3 shipments with accompanying invoices.

More apt is the opinion in United States v. Cochran, 235 F. 2d 131, 134 (C.A. 5) that:

> "Every word and line of this statute breathes the purpose to deal, it has the effect of dealing, only with the acts of persons falsely claiming money or property in the circumstances and with the effect dealt with in the statute. The statute does not deal with or denounce fraud in general. It cannot be read as doing so".

The Government here seeks to charge defendants with a multiplicity of forfeitures based on a concept of "fraud in general". Forfeitures should be im-

posed only with respect to acts of defendants themselves falsely claiming money or property or resulting in such false claims.

B. The objectives of the Act do not require charging a defendant with forfeitures for acts of others.

Petitioner states correctly that the originalpurpose of the statute adopted during the Civil War included both restitution and deterrence (Brief, p. 19). It forgets, however, that the statute in separate, but cross-referenced sections, later embodied in R.S. §§3490 and 5438, accomplished the restitution function by the civil provisions of §3490 and the deterrent function by the

criminal provisions of §5438.[7] The scope of the civil remedy cannot be expanded by an appeal to the need for deterrence which is the function of the criminal provisions.

The point was well taken by this Court in the Hess case, supra, 317 U.S. at 549, as follows:

> "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests, make elaborate provision both for a criminal punishment and a civil remedy. Violators of §5438 may 'be imprisoned at hard labor for not less than one or more than five

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[7] Now enacted into positive law in 18 U.S. C. §§287, 1001. See opinion below, Pet. App. A, p. 10A. Respondents here had been convicted on guilty pleas to a violation of 18 U.S.C. §1001. App. pp. 18-19, 47.

> years, or fined not less than one thousand nor more than five thousand dollars.' We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it".

The function of the civil remedies of forfeitures and double damages as devices to obtain restitution for the United States was recognized in Rex Trailer Co. vs. United States, 350 U.S. 148, 151-153 (cited Petitioner's Brief, p. 13, n. 9) in analogyzing the provisions of the Surplus Property Act, 40 U.S.C. §489, to those of the False Claims Act.

If Congress deems that frauds against the United States are not sufficiently deterred by existing law, the remedy is to increase the criminal penalties by statute, not to expand the civil liability of defendants by judicial interpretation.

II

BOTH OF THE LOWER COURTS CORRECTLY CREDITED RESPONDENTS WITH THE AMOUNT PAID BY THE PRIME CONTRACTOR BEFORE DOUBLING DAMAGES.

Although Petitioner argued below (see Pet. App. A., p. 5A) that no part of the $18,000 settlement paid by Model on account of the claim asserted in this case should be credited to respondents, it now asserts only that this payment should be credited after damages are first doubled. (Brief, pp. 28-29). No case dealing with payments on account of the false claims is cited. In fact, the only case prior to the one at bar dealing with this question supports the decisions below.

In United States v. Klein, 230 F. Supp. 426, 443 (W.D. Pa.), affirmed per curiam, 356 F. 2d 983 (C.A. 3) the court

dealt with this question as follows:

> "The defendant, however, contests the right of the plaintiff to receive damages with the allowance of credits due from the doubled damages. The question here is to whether credits are allowable from single damages or double damages. Certain credit amounts were received by the plaintiff after foreclosures of the properties. The government urges that damages should be first doubled and that allowable credits should be deducted from the double damages. The defendant disagrees. The Act provides that in addition to the $2,000 forfeiture, the plaintiff is to be allowed double the amount of damages which it may have sustained. The Act does not indicate when damages are to be doubled, it merely provides for double the amount of damages, and this reasonably appears to be such as are finally determined .
>
> "Accordingly, the credit should be first deducted from the single damages as finally determined and the remainder doubled for the purpose of determining the amount of damages to which the plaintiff was entitled".

The Klein decision finds support in the Rohleder and Hess decisions, supra. As the court in Rohleder noted, 157 F. 2d at 129, the trial court in Hess, 41 F. Supp. 197, 205 (W.D. Pa.) (affirmed at 317 U.S. 537, 553) had found, in allowing the $2,000 forfeitures, that there were certain "instances where the United States withheld payments on account of the discovery of the fraud, so that no actual damage was shown". Significantly, in the instant case, the payment by Model was effectuated in the form of a deduction from money still owed Model under the same contract. (App. pp. 60-69, see point 3 under the Statement above).

Just as in the Hess case, there were therefore no damages to double.

Petitioner hints that there is some basis for applying the collateral source rule by citing (Brief, p. 27) Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669 (1962). This article points out that the collateral source rule does not apply to sums received from the wrongdoer in reparation or from joint tortfeasors. 46 Minn. L. Rev. at 671 n. 4.

Respondents, of course, were in privity with Model and were liable to it for any sums it paid the United States on account of respondents'

wrongdoing. The case which first used the term "collateral" in reference to this rule (id. at 671 n.7) was Harding v. Town of Townshend, 43 Vt. 536, 538 (1871). In that personal injury accident case, credit was denied the defendant for money received by plaintiff from his accident insurance company, the court stating:

> "The insurer and the defendant are not joint tortfeasors or joint debtors so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procurred solely by the plaintiff and at his

expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties or by contract or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant; nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit". (Emphasis added)

The rule does not apply here where there was privity between Model and respondents. See also Harper and James, The Law of Torts 1343-1344.(1956)

Viewed in the light of the limited applicability of the collateral source rule, petitioner's reference (Brief,

pp. 28-29) to United States v. Globe Remodeling Co., 196 F. Supp. 652 (D. Vt., 1961) will be seen as inapposite. In that case the sources making the payment were truly collateral to the defendants against whom damages were sought. The defendants had aided in procuring Federal Housing Administration insured loans to others by means of false statements. However, the actual borrowers made the payment in question. Clearly, these borrowers who actually received the money in the first place would have no claim over against the defendants who aided them in procuring the loans by making false statements. In the case at bar, however, Model's

loss, for which it repaid the Government, is directly attributable to defendants and Model had a claim over against the defendants.

We have already dealt in the preceding point with the argument (Petitioner's Brief, p. 20) respecting the deterrent effects of allowing credit only after damages have been doubled. As this Court said in the passage already quoted from Hess:

> "We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it". 317 U S. at 549.

The mechanism by which the doubling

is accomplished should not be expanded in order also to increase the deterring punishment which has been properly left to the criminal provisions.

There is no relevancy to the citation in petitioner's brief (p.30) to United States v. ITT Continental Baking Co., No. 73-1290, decided February 19, 1975 (slip op., p.9). That case in no way concerned the issue of damages, but rather statutes (15 U.S.C. §§ 21 [1] and 45 [1]) which imposed "a civil penalty" for violations of orders of the Federal Trade Commission. Id. at p. 5, n. 5 and 6.

To restate this point another way, let us suppose that (1) the conduct

for which respondents were charged was that proscribed by the third clause of R.S. §5438, a conspiracy to defraud the United States by obtaining payment of a false claim, but (2) that Model discovered the false branding of the tubes and never delivered them to the Government. In such event, respondents might have been liable for a $2,000 forfeiture, butthere would have been no damages to double. Similarly, if only part of the total number of false tubes had been delivered. So, too, when as here, Model delivered all the falsely branded tubes, but then allowed the Government full credit therefore, the Government has suffered no damages

to be doubled.

III

SHOULD THIS COURT HOLD THAT THE COURTS BELOW ERRED IN THE MANNER OF ASSESSING DOUBLE DAMAGES, THE CASE SHOULD BE REMANDED FOR COMPUTATION OF DAMAGES ACTUALLY SUFFERED WITH INSTRUCTIONS TO ALLOW RESPONDENTS CREDIT, BEFORE DOUBLING, FOR THE FAIR MARKET VALUE OF THE GOODS DELIVERED.

Petitioner's position with respect to the issue here argued is presented solely in footnotes to its brief. In note 6 (Brief, p. 5) it referred to respondents' contention in the district court that "damages should be further reduced by the fair market value of the nonconforming tubes. That contention," it said, "was rejected by the court as moot once it had determined that Model's payment of damages was to be credited against the Government's

single damages". Then it noted that "respondents took no appeal from that aspect of the district court's judgment." Petitioner makes the same point at note 14, page 26 where it also argues on the merits that credit should not anyhow have been given for the market value of the goods.

It is submitted that petitioner errs both (1) in its innuendo that the issue is foreclosed by the failure to appeal from an issue rendered moot by "the award of only nominal double damages" (Petitioner's Brief, p. 6) and (2) its argument on the merits. (3) Furthermore, as we showed above in the Statement, there was no proper

proof of the damages to the Government occasioned by replacement of the tubes.

A. Respondents are not precluded from pressing their contentions as to damages by the failure to appeal from the judgment of only nominal damages.

As to (1), a "federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it". St. Pierre v. United States, 319 U.S. 41, 43; United States v Alaska Steamship Co., 253 U.S. 113, 115-116; United States v Hamburg-Amerikanische Co., 239 U.S. 463, 475; Nelson v United States, 443 F. 2d 75 (C.A. 5); Greenspun v State of Nevada, 430 F. 2d 1327 (C.A. 9), cert, denied, 400 U.S. 1009;

Blackburn v U.S. Parole Board, 429 F. 2d 364 (C.A. 5); Armendariz v Hershey 413 F. 2d 1006, 1008 (C.A. 5). It being undisputed that the damages awarded were nominal and that the issue of the actual amount was therefore moot, there was nothing for respondents to appeal.

B. Even if the doubling formula sustained below was erroneous, correct computation of damages proven will not give the result petitioner seeks.

1. The failure of proof of replacement costs will result in no damages.

As shown, at most the Government has proven, albeit belatedly, only replacement of 96 tubes for $3,918.72. Doubling of this amount and

then crediting Model's payment of $16,165.84 will still give zero damages. If this Court agrees, an affirmance is required, or at most a remand to redetermine damages actually incurred.

2. In any event, respondents should be credited with the market value of the tubes sold to the Government prior to doubling damages.

The cases cited in Petitioners Brief (pp. 26-27 n.14) in fact support respondents' position that they should becredited with the market value of the tubes sold prior to any doubling.

In United States v. Collyer Insulated Wire Co. 94 F. Supp. 493, 498 (D.R.I. 1950) the court noted that all of the wire shipped to the Government, while it did not meet the specifica-

tions, had value at least to the defendants and none was ever returned nor was there any offer of return made by the plaintiff. It further added that "it is not at all clear from the evidence, that all the wire and cable were worthless even to the Government". Based on this, the court declined to award damages at all. The reasoning is equally applicable here. The Government never offered to return the tubes to the defendants. They had at the time in question a market price of $15.52 per tube (App., p. 45). The tubes in fact underwent a MIL-E-1 electrical test, which is the production test part of the JAN procedure

(App., p. 43) and were found operable. (App., p. 47). Indeed, petitioner does not claim that the falsely labeled tubes shipped to it had any physical defects. This is made clear from its answers to interrogatories set forth above in the Statement.

United States v. Ben Grunstein & Sons Company, 137 F. Supp. 197, 205 (D.N.J. 1955) held that the proper measure of damages under the False Claims Act is "the value of the property which the person defrauded would have received but for the fraud, less, as a credit, the value of the property which he has in fact received".

The rule of the Ben Grunstein case

is also stated in United States vs. Woodbury, supra, 359 F. 2d at 379 as follows:

> "Ordinarily the measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful".

United States vs. Foster Wheeler Corp., 447 F. 2d 100, 102 (C.A. 2) refers to the Woodbury and Ben Grunstein cases for the correct measure of damages and also to United States v. American Packaging Corp., 125 F. Supp. 788, 791 (D.N. J. 1954). In the latter case the court noted the measure of damages as "the difference between the value of what the government

was entitled to receive under the contracts and the value of what it actually received". See also United States v. American Precision Products Corp., 115 F. Supp. 823, 828 (D.N.J. 1953)

In Toepleman v United States, supra, 263 F. 2d at 700, credit for the market price of the goods was allowed before doubling, the only issue there being the date on which the market price should be determined.

If this Court should find error in the rulings below on the doubling of damages, a recomputation on the basis of $40.82 per tube would result in the following:

Damages for 397 tubes at $40.82	$16,205.54
Less credit for market value at $15.52. .	6,161.44
Net damages.	10,044.10
Doubled.	20,088.20
Less credit for settlement with Model	16,165.84
Net amount due . . .	3,922.36

In this event, the case should be remanded with instructions either (1) to enter damages as shown, or (2) alternatively, to fix the damages by crediting defendants with the fair market value of the goods, as determined by the trial court, before doubling, and then crediting with the payment from Model.

CONCLUSION

The judgment of the court of appeals should be affirmed. Alternatively, should this Court reverse on the issue of damages, the case should be remanded to the district court with instructions to enter a judgment for the United States only after determining its actual damage and giving proper credit for the fair market value of the tubes delivered.

Respectfully submitted,

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